tion for a pecuniary or material loss. The designated beneficiaries in our Civil Law Ordinance are the wife, the husband, the parent and the child, if any, of the deceased. The law was amended in England in 1959. Section 1(2)(b) of the English Fatal Accidents Act, 1959 enacts as follows:

"In deducing any relationship for the purposes of the said Act and this Act any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child."

I am of the view that the stepfather and stepmother have been deliberately omitted from our legislation which is primarily based upon and follows the pre-1959 English legislation on the subject. Our legislature has not up to now adopted the amendments brought about in England by the Fatal Accidents Act, 1959. It is a matter for the legislature to decide whether it should follow the pattern of the new legislation in England.

The Johore Enactment having been repealed and the law having been amended, I am of the view that there is no force in the contention of the plaintiff that his stepmother is contemplated by the legislature as being included in the term "parent." Her rights, if any, became extinct on the passage of the Civil Law Ordinance, 1956.

Judgment accordingly.

Solicitors: *Laycock & Ong; Rodyk & Davidson.*

GNANASUNDRAM v. GOVERNMENT OF MALAYSIA

[O.C.J. (Abdul Hamid J.) December 18, 1970]

[Kuala Lumpur — Civil Suit No. 204 of 1968]

Administrative Law — Appointment as Temporary Enforcement Officer — Termination of employment — Termination in accordance with terms of offer of appointment — Termination on giving one month's pay in lieu of notice — Action for wrongful termination of appointment — Whether person has a right to be heard — Federal Constitution, art. 135(2).

Contract — Employment — Appointment of officers in the Government service — Whether appointment has to be made by written contract executed in the manner provided by the Government Contracts Ordinance 1949 — Federal Constitution, art. 144.

Damages — Claim for wrongful termination of employment.

The plaintiff had been appointed as temporary enforcement officer. The letter of appointment provided that his services could be terminated by giving three months' notice or one month's salary in lieu of notice. The services of the plaintiff were terminated by giving him one month's salary in lieu of notice. He then brought an action for damages for the wrongful termination of his appointment and alternatively for a declaration that he was still in the employ of the defendants. It was argued *inter alia* that the services of the plaintiff were terminated without his being given a reasonable opportunity of being heard and contrary to regulation 33(a) of Chapter D of the General Orders, regulations 49 and 50 of the Public Services (Conduct and Discipline) Regulations and articles 135(2) and 136 of the Federal Constitution. It was also submitted in the course of argument that although the Government may lawfully enter into a contract, there was no evidence in this case of a signature by the proper person for the purpose of section 2 of the Government Contracts Ordinance, 1949.

Held: as in this case the services of the plaintiff were terminated in accordance with the terms of the offer of appointment, the plaintiff could not claim a right to be heard under article 135(2) of the Federal Constitution and therefore the plaintiff's claim cannot succeed.

Semble: Appointment of officers in the Government service, temporary or otherwise, is not made by written contracts executed in the manner provided under the Government Contracts Ordinance, 1949. Such an appointment is made by the Public Services Commission. Any appointment by the Public Services Commission in exercise of its functions pursuant to article 144 of the Federal Constitution is in effect in the nature of a special contract and once an appointment is made the Government is bound by the terms and conditions of such appointment.

Cases referred to:-

(1) *Gnanasundram* v. *Public Services Commission,* [1966] 1 M.L.J. 157 at p. 159.

(2) *Parshotam Lal Dhingra* v. *Union of India,* A.I.R. 1958 S.C. 36.

(3) *Munusamy* v. *Public Services Commission,* [1967] 1 M.L.J. 199.

(4) *Satish Chandra* v. *Union of India,* A.I.R. 1953 S.C. 250.

CIVIL SUIT.

Raja Abdul Aziz for the plaintiff.

Mrs. Ng Mann Sau (Federal Counsel) for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: The plaintiff is claiming damages for the wrongful termination of his appointment as temporary enforcement officer in the Road Transport Department of the Federation of Malaya and alternatively is asking for a declaration that he is still in the employ of the defendants.

The facts insofar as they are not in dispute are that the plaintiff accepted the appointment of temporary enforcement officer on the terms and conditions contained in the letter of offer of appointment dated 21st November, 1961, the relevant part of the letter of offer is reproduced hereunder —

"I am directed to inform you that on behalf of the Government of the Federation of Malaya, the Public Services Commission is pleased to offer you appointment as temporary enforcement officer, Road Transport Department, Federation of Malaya,

on a salary of $605/- per mensem on the scale $605x23–835 with effect from the date of assumption of duty following the acceptance of this offer.

In addition you will receive a variable cost of living allowance at current rates.

2. This offer is subject to the following conditions:—

(a) That you are medically fit. Your acceptance of the offer must be accompanied by an acceptable medical certificate from a government medical officer on the attached Form Gen. 402;

(b) That you sign the statutory declaration attached. You will be liable to instant dismissal if any statement in the completed declaration is later found to be untrue;

(c) That you serve on probation for a period of Nil years. Before you can be considered for confirmation in your appointment you should pass the under-mentioned examinations:—

Nil

(d) That during the first year of the period of your appointment, your services would be terminable at any time with one month's notice or one month's salary plus cost of living allowance in lieu, and without any reason being given. You would also be free to relinquish your appointment by giving one month's notice or one month's salary in lieu plus cost of living allowance. During the rest of your period of appointment, the appropriate notice required for both parties would be three months or one month's salary in lieu plus cost of living allowance;

(e) That you are at all times subject to government general orders, circulars and other administrative instructions as may from time to time be issued relating to work, conduct and conditions of service of officers in the public service;

(f) That you will be liable to be employed in any part of the Federation of Malaya.

3. The appointment offered is temporary."

It is alleged by the plaintiff that on or about 10th August, 1964, the defendants wrongfully terminated his appointment. In support of the allegation the plaintiff says that —

(a) He was not paid a month's salary in lieu of notice on 10th August, 1964, as required by paragraph 2(d) of the said offer of appointment.

(b) His services were terminated without being given a reasonable opportunity of being heard and contrary to regulation 33(a) of Chapter D of the General Orders, regulations 49 and 50 of the Public Services (Conduct and Discipline) Regulations and article 135(2) and article 136 of the Federal Constitution.

(c) No reasons were given for the termination until the 2nd day of March, 1967, *vide* Bil. (3) dlm. KP/PJR(S) 8 Vol. III. This is contrary to paragraph 2(d) of the offer of appointment.

It is further alleged that the defendants by wrongfully dismissing him, have repudiated their contract with him causing him to suffer damage and he was consequently unable to obtain suitable employment.

A statement of agreed facts (AF) was submitted at the hearing of this suit. It is agreed, among other things, that the plaintiff's services were terminated with effect from 10th August, 1964 by the Public Services Commission in accordance with paragraph 2(d) of the offer of appointment by payment of one month's salary and cost of living allowance in lieu of 3 months' notice by a letter of termination dated 4th August, 1964 handed to the plaintiff by the *Pemangku Pendaftar dan Pemereksa*, Raub, Pahang, on 10th August, 1964. It is also agreed that the plaintiff accepted the notice of termination. The cheque representing one month's salary and cost of living allowance in lieu of notice drawn on Malayan Banking Limited, Kuantan, No. 018272 dated 20th August, 1964 was sent to his then residential address of 6, Taman Sentosa, Raub, on 24th August, 1964 and was returned by the postal authorities undelivered.

In the light of paragraph 2 of the agreed statement of facts, I am unable to see how the plaintiff may now be heard to say that he was not paid a month's salary as required by paragraph 2(d) of the offer of appointment. Raja Abdul Aziz, counsel for the plaintiff seems to suggest that the month's salary in lieu of notice must take the place of the notice and must be paid on the date of the termination. Mrs. Ng Mann Sau, senior federal counsel appearing for the Government of Malaysia, argued that the plaintiff was aware that the payment by cheque would be made when he accepted the letter of termination and it is further argued that as from 10th August, 1964, the right of the plaintiff was only to one month's pay.

The terms of the appointment, I think, clearly provide that the plaintiff's services may be terminated by the defendants with one month's salary in lieu of 3 months' notice. There was no specific provision stipulating that the month's salary must be paid on the day of the termination. As from that date, it cannot perhaps be denied that the plaintiff was entitled to the month's salary in the sense that it became due and payable and was thereby entitled to a right of action against the defendants for the recovery of the sum due in the event of non-payment by the defendants. Under the terms of the appointment, the plaintiff too was also entitled to relinquish his appointment by giving one month's salary in lieu of notice. If the plaintiff were to do so, the defendants, I think, would have been entitled to a month's salary in lieu and to a right of action against the plaintiff for the recovery of the sum due if no payment was made.

Even if it should be held that payment must be made on the date of termination, I find as a fact that the plaintiff was told and indeed there is nothing to show that he objected to the payment which would be sent to him by cheque when it was ready. In his evidence, the plaintiff denied this, yet in his letter addressed to the Public Services Commission dated 12th August, 1964 two days after he was handed the letter of termination, he referred to the promised payment of the salary. Lim Tay Sai (D.W. 1) did in fact advise the plaintiff that payment would be made as soon as possible when he handed the letter of termination to the plaintiff as directed by *Pengawal Pertadbiran* Ong Say Bin (D.W. 2) in the letter to D.W. 1.

In the circumstances, I am satisfied that the defendants terminated the services of the plaintiff pursuant to and in accordance with the requirements of the terms contained in paragraph 2(d) of the offer of appointment.

Before I proceed to consider the other issue raised, I should like to refer to the submission made by the plaintiff's counsel that though it is conceded that the government may lawfully enter into a contract, it is contended that in this particular case, there is no evidence of a signature by the proper person for the purpose of section 2 of the Government Contract Ordinance (No. 67) of 1949. He further referred to section 6 and submitted that unless it was made in a certain manner, it could not be deemed to have been made on behalf of the Federation. From the pleadings it does not seem to me that the plaintiff is challenging that the relationship between him and the defendants is contractual. It may be relevant to refer to the decision of Raja Azlan Shah J. in *Gnanasundram* v. *Public Services Commission*[1] on an application made by the

plaintiff for *certiorari*. Though he did not deal with the merits of the case, his Lordship concluded that the case was sufficiently analogous to a contractual relationship. In the instant case, the court should not, I think, lose sight of the fact that in regard to ordinary government contracts, they are entered into by the government through its officers. Appointment of officers to the government service, temporary or otherwise, is not however made by way of written contracts executed in the manner provided under the written law referred to. It is a matter which, under our Constitution, is placed in the hands of the Public Services Commission, a special body established thereunder exercising its functions pursuant to article 144. Any appointment made in exercise of that function by the Public Services Commission is in effect in the nature of a special contract and once an appointment is made, the government is bound by the terms and conditions of such appointment.

The plaintiff is also contending that his services were terminated without his being given a reasonable opportunity of being heard and contrary to regulation 33(a) of Chapter D of the General Orders, regulations 49 and 50 of the Public Services (Conduct and Discipline) Regulations and article 135(2) and article 136 of the Federal Constitution. Raja Abdul Aziz submitted that there was a sudden termination of the plaintiff's services. It was, he said, a cloak for dismissal and article 135(2) should therefore apply. In dealing with this issue, it must be remembered that it was expressly provided that the appointment was temporary. The plaintiff was fully aware that his services could be terminated at any time when he accepted the appointment. He must therefore be deemed to have accepted the terms and conditions contained in the offer of appointment. When the defendants terminated the services of the plaintiff, they were in effect exercising the right under and in accordance with the terms of the offer of appointment. The plaintiff cannot, I think, be heard to complain if he had indeed agreed to be bound by those terms. It does not seem to be the concern of this court to go behind the administrative machinery of the government so as to inquire into the reason why the defendants should want to terminate the plaintiff's services. Since the defendants had properly exercised the right in accordance with the agreed terms of appointment, it is unreasonable and indeed there is absolutely no reason for this court to hold that such termination was a cloak for dismissal.

Raja Abdul Aziz referred to regulation 33(a) of Chapter D which reads —

"33. (a) If the conduct of any officer not on the pensionable establishment who is in Division I or II of the Public Service appears to his Head of Department to merit dismissal the Head of Department shall forward a full report of the circumstances to the appropriate Disciplinary Authority."

That regulation clearly deals with "dismissal". In the instant case, there is no question of dismissal. If there was, it would presumably be open to this court to consider whether this regulation would apply. The plaintiff also referred to article 135(2) of the Constitution which reads —

"135. (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

Again it is clear that the article deals with a restriction on dismissal or reduction of rank. I wish to emphasize that in the instant case, it was made an express term that the appointment was temporary and it was also expressly provided that the government reserves the right thereby to terminate the services of the plaintiff by giving one month's salary in lieu of notice, and, provided the termination is done in accordance with and in the manner provided by those terms, *prima facie* the defendants had acted lawfully.

The learned counsel further submitted that the suddenness of the termination and the non-compliance with the procedure provided under regulation 33(a) of Chapter D amounts to a punishment and article 135(2) should therefore apply. For this purpose, I should like to refer to *Parshotam Lal Dhingra* v. *Union of India*[2] which case was referred to by the Privy Council in *Munusamy* v. *The Public Services Commission*.[3] In that case the Supreme Court consisting of S. R. Das C.J., Venkatarama Aiyar, S. K. Das, Sarkar and Bose JJ. considered the question of when termination of service or reduction in rank amounts to punishment. It was held by a majority view as follows —

"Shortly put, the principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, termination of the service of such a servant or his reduction to a lower post is by itself and *prima facie* a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment.

One test for determining whether the termination of the service of a Government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post, the termination of his service will by itself be a punishment and he will be entitled to the protection of art. 311.

In other words and broadly speaking, art. 311(2) will apply to those cases where the Government servant, had he been employed by a private employer, will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, if the Government has, by contract, express or implied, or, under the rules the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, *prima facie* and *per se*, not a punishment and does not attract the provision of art. 311.

Where, however, the termination of service is founded on the right flowing from contract or the service rules then, *prima facie*, the termination is not a punishment and carries with it no evil consequences and so art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of art. 311 must be complied with."

I must say that though this case is not binding on this court, to quote what Lord Hodson in *Munusamy's* case, *supra*, at 201 said —

"The Indian cases decided on the interpretation of article 311 of the Constitution of India are of persuasive authority."

Now, in the light of *Parshotam's* case *supra*, I am of the opinion that the defendants having terminated the services of the plaintiff under and in accordance with the express terms of the appointment and in the manner required by those terms, it is *prima facie* and *per se* not a punishment and would not attract the application of the provisions of article 135(2) of the Constitution. As regards *Munusamy's* case, *supra*, it should be borne in mind that while it does throw some light regarding the interpretation of article 135(2) of the Constitution, the real question that called for determination in that case was as stated by Lord Hodson at page 201 second column —

"The main question for determination on the appeal is whether the respondent's termination of the appellant's appointment reverting him to his previous post of Immigration Officer under these circumstances amounted to dismissal or reduction in rank for the purposes of clause (2) of article 135 of the Constitution."

In the present case, we are not dealing with any question of reduction of rank and the facts of this case are in no way similar to the facts of that case. Perhaps the only thing which this court should take into consideration is that in *Munusamy's* case *supra*, the Privy Council emphasized that "dismissal" relates to disciplinary action. For reasons which I have stated earlier, there is nothing to suggest that the termination of the plaintiff's services was an exercise by the Public Services Commission of a disciplinary action.

Mrs. Ng Mann Sau in her submission cited the case of *Satish Chandra* v. *Union of India*[4] where it was held that article 311 of the Indian Constitution has no application where it is an ordinary case of a contract being terminated by notice under one of its clauses. In dealing with employment contracts, it was held in that case at page 252 that —

"... the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer."

The learned counsel for the plaintiff also submitted that if it is held that there is a contract, then he urged the court to consider clauses 2(d) and 2(e) which, it is contended, are conflicting. In my opinion, under clause 2(e) it is clearly intended that the plaintiff, on acceptance of the appointment, should like other government officers, be subject to government general orders, circulars and other administrative instructions as may from time to time be issued relating to work, conduct and conditions of service of officers in the public service. It was open to the plaintiff to accept or reject the appointment on the terms offered. It is not disputed that the plaintiff did freely accept the appointment. In the instant case, I am also of the opinion that the terms of the appointment as contained in sub-paragraph (e) should not be construed in isolation. It has to be read and indeed it should be subject to the express term contained in sub-paragraph (d) in regard to the question of termination of service.

For the reasons which I have stated, it is my finding that the plaintiff's claim cannot succeed. I therefore dismiss the claim with costs.

Claim dismissed.

Solicitors: *Rithauddeen & Aziz.*

GOVERNMENT OF MALAYSIA v. GURCHARAN SINGH & ORS.

[O.C.J. (Chang Min Tat J.) December 21, 1970]

[Ipoh — Civil Suit No. 466 of 1969]

Contract — Infant — Agreement to serve Government in consideration for being trained as a teacher — Whether void — Whether sureties liable — Necessaries — Whether training constitutes provision for necessaries — Liability of infant and sureties — Provisions for repayment on breach of contract — Whether a penalty — Contracts (Malay States) Ordinance, 1950, ss. 11, 69 and 81.

Damages — Breach of contract — Compensation.

The Government sued the first defendant as the promisor and the second and third defendants as sureties for breach of agreement in writing entered into by them with the plaintiff for providing a course of training at a Malayan Teacher's Training Institution. The claim was for $11,500 alleged to be actually spent by the Government for educating the first defendant. At the time of the contract being entered into the first defendant was an infant and the defence was essentially that the contract entered into by the first defendant was void and that consequently the second and third defendants were not liable. Alternatively it was pleaded that as the first defendant had served the Government for three years ten months out of the contractual period of five years, the claim for $11,500 was excessive and not reasonable compensation. The statement of claim was amended at the hearing to include an alternative claim for the repayment of the sum claimed as having been expended on the infant for necessaries.

Held: (1) the contract entered into by the first defendant was void as he was an infant at the relevant time;

(2) as the second and third defendants were sureties, their liability was co-extensive with that of the principal debtor, and as the principal debtor was not liable, the sureties also were not liable;

(3) the word "necessaries" must be construed broadly and in the circumstances of this case, the provision of professional or vocational training for the first defendant in a Teacher's Training Institution to enable him to qualify for and accept appointment as a teacher was a provision for necessaries;

(4) the first defendant was therefore liable for the repayment of the sum expended for his education and training as being expended on necessaries;

(5) the provisions for repayment for breach in the contract was a penalty clause and therefore not enforceable;

(6) the amount of damages payable in this case must be based on repayment of the proportion of the actual sum expended based on the completed months of service and in the circumstances judgment would be given for the plaintiff against the defendants for $2,683.

Cases referred to:-

(1) *Mohori Bibi & Anor.* v. *Dhurmodas Ghose*, (1902-3) L.R. 30 I.A. 114.

(2) *Nash* v. *Inman*, [1908] 2 K.B. 1, at p. 8.

(3) *Sohan Lal* v. *Puran Singh*, A.I.R. 1916, Lahore 376.